FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**MAN/00DA/HNA/2023/0021**
Date of Hearing	**:**	**31st October 2023**
Property	**:**	**76 Compton Crescent, Leeds LS9 6DQ**
Appellant	**:**	**Mr Richard Whalley**
Respondent	**:**	**Leeds City Council**
Type of Application	**:**	**Housing Act 2004, Section 249A & Sch. 13A**
Tribunal Members	**:**	**Mr Phillip Barber (Tribunal Judge)** **Ms Jennifer Jacobs (Valuer Member)**

DECISION AND REASONS

Decision

We have decided that the appropriate financial penalty under section 249A of the Housing Act 2004 for the offence of failing to comply with a selective licencing requirement under section 95(1) of the Housing Act 2004 is £7500 which we substitute for the Respondent's civil penalty of £25,000.

Reasons

Introduction

1. This Decision and Reasons relates to 1 appeal against the imposition by the Respondent of a financial penalty under section 249A of the Housing Act 2004 ("the Act") in relation to 1 property owned by the Appellant, Mr Richard Whalley. The property is 76 Compton Crescent, Harehills, Leeds LS9 6DQ ("the property").

2. We held an oral face to face hearing of this appeal. The Appellant came to the hearing and was represented by Mr Whitaker from Howe & Co. Solicitors. The Respondent was represented by Ms Vodanovic, counsel. We heard evidence from Mr Carr, Housing Officer for Leeds City Council and evidence from Mr Whalley, the Appellant.

3. There was no inspection of the property by the Tribunal, which was unnecessary, and we had a bundle of documents from the Respondent and a bundle of documents from the Appellant.

Findings of Fact

4. The Appellant is the registered owner of the Property which he rents out to paying tenants and which he has owned for several years.

5. On the 06 January 2020 the Harehills area of Leeds (as designated in a map) became a selective licensing area. The full designation is set out in the Respondent's bundle and the Property is situated in that area. No issue was taken, correctly, in relation to that designation and on the 31 December 2019, a selective licence application was submitted by the Appellant in respect of the Property with a selective licence being granted on the 30 July 2021.

6. That licence is contained within the bundle and includes a number of general conditions as permitted in section 90 of the Housing Act 2004, in relation to the condition and general management of the Property. It is unnecessary to set them out in any detail, but the conditions are variously headed, Gas, Smoke Alarms, Anti-social Behaviour and Management of the Property.

7. On the 11 May 2022, the Respondent received a complaint from a local health visitor in relation to problematic conditions for the tenants at the property in relation to pest control, a faulty cooker and an insecure front door following a police raid. On the 13 May 2022, the Respondent wrote to the Applicant with a list of issues in relation to the property and provided 28 days to investigate and report

back. On the 28 June 2022, the Respondent ascertained from the tenant that whilst some works had been completed, various works were outstanding and on the same day, during a conversation with Mr Whalley, Mr Whalley confirmed that he intended to carry out the works but that he had had covid. After this conversation, the Respondent provided a list of works which were required as set out on page 144 of the Respondent's bundle. This list included the following: unable to close the bedroom window on the first floor; broken bath panel; damp around the living room window; collapsed living room ceiling and issues with cockroaches. Mr Whalley was provided with two weeks further to complete the works.

8. On the 19 July 2022, the Respondent again spoke with the Appellant to request an update and was told that the works would be completed within a week but on the 26 July 2022, the Respondent was advised by the Tenant that no further works had been completed. On the same day the Appellant was warned that if works were not completed within seven days, the property would be visited for selective licence compliance. On the 04 August 2022, the Tenant again advised that works were not complete and the property was thereafter inspected on the 18 August 2022 by Mr Carr, after which the Appellant was asked, by letter, to provide a list of documents in relation to gas and electric safety, documents in relation to the smoke alarms, together with a copy of his Anti-Social Behaviour policy and copies of references for the tenant.

9. Various documents were provided on the 26 August 2022 and on the 01 September 2022, the Respondent wrote to the Appellant with a request to answer various questions under PACE, including a copy of the inspection report and the list of purported licence contraventions.

10. Following a response to that request on the 16 September 2022, the Respondent wrote to the Appellant on the 13 October 2022, by way of a notice of intent to impose a financial penalty in the sum of £25,000.

11. On the 04 January 2023, the Respondent reinspected the property at which point it was determined that all works had been completed. ON the 31 January 2023, the Respondent issued the Appellant with a final notice to impose a financial penalty in the sum of £25,000.

12. Mr Whalley appealed the imposition of a financial penalty and the Tribunal heard that appeal on the 31 October 2023.

The Legal Framework

13. By section 249A of the Housing Act 2004:

(1) The local housing authority may impose a financial penalty on a person if satisfied, beyond reasonable doubt, that the person's conduct amounts to a relevant housing offence in respect of premises in England.

(2) In this section "relevant housing offence" means an offence under—
.....

(c)section 95 (licensing of houses under Part 3),
.....

14. Section 90 of the Act provides that a local housing authority in granting a licence "may include such conditions as the local housing authority consider appropriate for regulating the management, use or occupation of the house concerned."

15. Section 95 of the Act provides that "(2) A person commits an offence if –(a) he is a licence holder…on whom restrictions or obligations under a licence are imposed in accordance with section 90(6), and (b) he fails to comply with any conditions of the licence."

16. Subparagraph 95(4) provides that "it is a defence that he has a reasonable excuse (a) for having control or managing the house in the circumstances mentioned in subsection (1)…".

17. By subsection (4) of section 249A the maximum penalty is £30,000 and subsection (6) provides that the procedure for imposing such a fine and for an appeal against the financial penalty is as set out in schedule 13A to the Act.

18. Paragraphs 1 to 3 of Schedule 13A set out the provisions in relation to a "Notice of Intent" which must be served before imposing a financial penalty. Paragraph 2 provides that the notice must be served within 6 months unless the failure to act is continuing (which is the case in this appeal) and paragraph 3 sets out the information which must be contained within the Notice.

19. After service of the Notice of Intent and following consideration of any representation made, paragraph 6 provides for the service of a "Final Notice", which must set out the amount of the financial penalty and the information required in paragraph 8: i.e., the amount, the reasons, how to pay and information about the right of appeal.

20. Paragraph 10 of schedule 13A sets out the provisions in relation to such an appeal:

(1) A person to whom a final notice is given may appeal to the First-tier Tribunal against—

(a) the decision to impose the penalty, or

(b) the amount of the penalty.

(2) If a person appeals under this paragraph, the final notice is suspended until the appeal is finally determined or withdrawn.

(3) An appeal under this paragraph—

(a) is to be a re-hearing of the local housing authority's decision, but

(b) may be determined having regard to matters of which the authority was unaware.

(4) On an appeal under this paragraph the First-tier Tribunal may confirm, vary or cancel the final notice.

(5) The final notice may not be varied under sub-paragraph (4) so as to make it impose a financial penalty of more than the local housing authority could have imposed.

21. Accordingly, the Tribunal, in this appeal, has jurisdiction over the decision to impose a penalty; the amount of the penalty and can confirm, vary or cancel the final notice including increasing, if it so determines, the amount of the penalty. The appeal is by way of a re-hearing, which we have conducted.

22. We had to be satisfied beyond reasonable doubt that the conduct of the Appellant amounts to a "relevant housing offence" under section 95 of the Act – i.e. that Mr Whalley failed to comply with licensing condition under Part 3 and in particular section 90 of the Housing Act 2004.

Our Assessment of the Appeal

23. This is a re-hearing of the decision to impose a financial penalty for a purported offence committed by the Appellant as a result of contravening section 95 of the Housing Act 2004.

24. We find as fact that the Notice of Intent and Final Notice were properly served and that they contained the proper statutory information. There were no procedural irregularities. In any

event the Appellant did not take issue with the process he was more concerned with the outcome.

25. There was also generally no dispute at the hearing that some aspects of the licence conditions were breached, the main thrust of the Appellant's case, and one with which we agree, was that the level of the fine at £25,000 was wholly disproportionate to the gravity of the offence.

26. In arriving at our conclusions, we had to make specific findings of fact in relation to each of the breaches listed in the "Schedule of Contraventions" reproduced on page 269 of the Respondent's bundle. At the hearing Mr Whitaker very helpfully set out at the start of the hearing which contraventions were accepted and which were refuted as follows:

Smoke alarms	– refuted
Pest infestation	– refuted
External vegetation	– accepted
Second floor bedroom	5 – refuted
	6 – refuted
	7, 8 – accepted
First floor bedroom	9, 10 – accepted
	11 – refuted
	12 – refuted
Living room	13, 14, 15, 16 – accepted
Kitchen	17 – refuted
	18 – accepted
	19 – refuted
	20, 21 – refuted
Bathroom	22 – accepted
	23, 24 – refuted
Ground to first stairs	25, 26 – refuted
Cellar	27 – admitted
	28 - refuted

The Evidence of Mr Carr

27. Mr Carr gave evidence to the Tribunal in line with his witness statement and answered cross questions from Mr Whitaker. Mr Carr's evidence can be accepted in its entirety insofar as it is a truthful and accurate account of the history of events in relation to this property and we accept that his report of what he saw when he visited the property is again an accurate reflection of the conditions in the property. We therefore broadly agree with Mr Carr's evidence. We only depart from Mr Carr in relation to his evaluation of where these contraventions lie in relation to the Respondent's civil penalty matrix. For the reasons we set out later, we disagree with him and his colleagues who finalised the level of the penalty, that the offence represented a high

degree of culpability and a high degree of harm. We also disagree with him and his colleagues in relation to the question of mitigation.

The Evidence of the Appellant

28. The Appellant gave evidence before us and was cross questioned by Ms Vodanovic in relation to various aspects of the appeal. We found the Appellant to be an open and honest witness who struck us as being a committed and hardworking landlord trying to manage this and his other properties in a fair handed and efficient manner. We accept that his methods and approach to housing management are haphazard with the lack of notes and record keeping being somewhat lamentable, but as Mr Whitaker rather pithily pointed out, he is an old-school landlord with an old-school approach, carrying information and lists around in his head. A system which has worked well for him for over 16 years.

29. It follows that we accept that the Appellant was generally trying to do his best but that in certain aspects of his role as landlord, his old-school system did not quite meet the grade in relation to modern methods of housing management and the requirement to comply with up-to-date housing standards.

30. The Appellant told us, and we accept, that the property was let to the tenant in 2021, although he could not be precise about the date. He told us that he knew the tenant and her mother, who is also one of his tenants, and that he let the property to her urgently as she was having problems at her current property in East End Park. He told us, and again we accept, that the current tenant can be problematic to deal with at times and is also in a difficult relationship, having been previously the victim of domestic violence. He told us and we accept, that at times gaining access to the property has proven difficult and that due to the urgency with which he moved the tenant into the property, he was unable to carry out a full decorative refurbishment. Again, we have to reason not to accept the Appellant's evidence in relation to this.

31. Finally, we accept that Mr Whalley had a bout of ill health during the period in question and like many people at that time suffered from a Covid infection. This prevented him from attending to some of the works in a timely fashion and delayed progress for a short period of time.

Reasonable Excuse

32. One issue which cropped up during the appeal was whether section 95(4)(b) concerns the offence holistically or whether it can be broken down into the individual aspects of an offence. At the hearing the parties agreed that given the wording of section 95(2)(b) – "fails to comply with any condition of the licence" the defence

of reasonable excuse must apply to each specific failure. So, for example, whilst the Appellant might not have a reasonable excuse in relation to one specific breach, he might have a reasonable excuse in relation to others. This is important in relation to this appeal as the various breaches of the licence conditions extend to quite a list.

Our Findings in relation to each alleged breach

33. Working from the list of contraventions reproduced on page 258 to 260 of the bundle and with the list of admissions set out above we make specific findings in relation to each breach as follows.

Smoke alarms

34. The contravention here is that covers were open, and batteries were removed. We think this is the responsibility of the tenant and whilst we accept that a landlord should have a scheme for regular inspection of the property, we cannot see how this could be reasonably so frequent as suggested by the Respondent. We find as fact that the Appellant provided an interlinked hard wired smoke detector system but that the tenant had, for whatever reason removed the lid and battery and that the Appellant has a reasonable excuse for this breach. We were in any event told, and we accept, that the Appellant asks his tenants to do a weekly check of the fire alarm system. Something which we accept. Accordingly, we find it not proven.

Pest infestation

35. In his appeal the Appellant states that he does not dispute a pest infestation at the property but makes the point that on each occasion an infestation is reported, he attends to it and in relation to the specific breach he instructed a pest controller to attend and remedy the issue. His defence to this is that it is the way in which the tenant uses the property which gives rise to the problem, not him. We accept this. It seems to us that it is not the Appellant who is causing the infestation and it is also not due to any underlying disrepair or substandard conditions at the property enabling infestation to occur but rather a lack of what the Appellant describes as keeping the property "in good order" by the tenant. We are therefore not satisfied beyond reasonable doubt that this constitutes a breach of a licence condition by the Appellant and that he has a reasonable excuse.

External

36. This includes vegetation growing out of the soil vent pip; poor decorative order to parts of the exterior and the uPVC door does not shut property into the door frame. These were all admitted by the Appellant and accordingly we find them proven.

Second floor bedroom

37. Item 5 is the missing door to the entrance. Whilst we accept that the door was missing, we think the Appellant has a reasonable excuse. He did not remove the door and we think it more likely that it was removed by the tenant, for whatever reason is not apparent. At the hearing there was a dispute as to whether the Appellant visited the property for a pre-let inspection, but he told us that he did, and we have no reason to disbelieve that claim. We think that during any inspection, missing doors would be apparent and given that we accept that he inspected the property shortly before the current tenant moved in, it follows that the door must have been removed subsequently. The Appellant has a reasonable excuse for this breach.

38. Item 5 is the taped-up vent, which is not accepted by the Appellant. We do not think that Mr Whalley taped the vent, and we think that he let the property with an un-taped vent. We think it more likely that the tenant has taped up the vent to prevent cold. Accordingly, the Appellant has a reasonable excuse.

39. Items 7 and 8 are accepted: the window is missing a handle and there is water damage to the ceiling. We therefore find that these are proven beyond reasonable doubt.

First floor bedroom

40. Item 9 detached gasket to upper casement window detached and item 10, lower casement window could not be closed are accepted and again we find these proven. In relation to items 11 and 12, these are refuted. Item 11 is a taped-up vent, and for the same reasons given above we find this not proven and in relation to item 12, we accept that the reason why the thermostat was not working is because there is a different thermostat for the system in a different part of the property. We do not think that this constitutes a breach of any licencing condition. We do not find that items 11 or 12 are proven.

Living room

41. All items in the living room are accepted and we find them proven. These include a section of the living room ceiling having collapsed; the window being difficult to open and close; the fire door leading to the staircase was in a poor condition and the fireplace permitted draughts to enter the room. These are all, it seems to us breaches of the housing management condition and therefore proven.

Kitchen

42. Item 17, the damaged floor tiles, is not accepted. But we find this proven. It seems to us that this is unlikely to be tenant damage and more likely to be general wear and tear which the Appellant ought to have identified during inspection of the property. We find this contravention proven.

43. Item 18, the defective fire door between the kitchen and living room, is accepted and again we find this item proven.

44. Item 19, the taped-up vent is not accepted and for reasons already given, we think this is more likely to have been taped up by the tenant and beyond the reasonable control of the landlord. This is not proven.

45. Items 20 and 21 are not accepted and relate to the condition of the kitchen door units and laminate worktop, but we think that these are unlikely to be due to the tenant failing to use the property in a tenant-like manner and more likely to be due to general wear and tear and the age of the units. We think that this is a breach of the housing management condition and breaches for which the Appellant is responsible and liable. We find these proven.

Bathroom

46. Item 22, debris falling from the bathroom window reveal is accepted and we find it proven.

47. Items 23, the light fitting and item 24, the loose shower valve, are not accepted. The Appellant's case is that in relation to item 23 the tenant should have replaced the light bulb, which we accept and in relation to item 24 his case is that the tenant should have tightened the shower fitting so that it is not dripping, again which we accept. It follows that we do not find items 23 and 24 proven.

Ground to first floor stairs

48. Items 25, loose handrail and item 26, missing handrail are not accepted by the Appellant. However, in his defence the Appellant stated that he was unaware of the loose handrail but that he accepted the missing handrail. We find both contraventions proven. We think it unlikely that a handrail would come loose if it were properly fitted and under normal tenant usage and this issue ought to have been picked up earlier during a property inspection. In relation to the missing handrail, this was accepted in the defence, and we agree with the Respondent that this is a contravention of the housing management condition in the licence. For those reasons we think that both are proven.

Cellar

49. These relate to item 27, the lack of a proper ceiling in the cellar, with exposed insulation, which was admitted by the Appellant and item 28, the removal of the boiler cover which was not accepted. We find the lack of a proper ceiling to be a breach of the licence conditions and proven but we accept that it is unlikely that the Appellant removed the boiler cover and that in all the gas safety checks, a

missing boiler cover has not been identified and so there is evidence that Mr Whalley does not go into his properties and remove boiler covers. It is difficult to understand why the tenant might want to do this, but we think it more likely that she, or one of her visitors removed the cover. We do not find that item 28 is proven.

50. We find, therefore that of the items listed above as proven beyond reasonable doubt, that the Appellant, Mr Whalley has committed an offence under section 95(2) of the Housing Act 2004 and that he is liable for a financial penalty as follows.

The Amount of the Penalty

51. The starting point is the Respondent's policy in relation to civil penalties which has been provided in the Respondent's bundle. The policy document generally requires consideration of a matrix comprising of the level of culpability set against the level of harm. There are three levels of culpability ranging from high (intentional or reckless) through to medium (negligence) down to low (no fault) and likewise, three levels of harm, high (serious effect/vulnerability), medium (adverse effect that is not high) and low (low risk of harm or potential harm).

52. The policy thereafter sets out a harm/culpability matrix in which the level of harm is assessed in line with the level of culpability so as to provide a starting point banding with a starting point within which a range of financial penalties might be expected. That starting point can then be increased or reduced within that range by reference to aggravating and mitigating factors.

53. The Respondent has set out in both the final notices its reasons and conclusions in respect to the policy and the factors leading up to the assessment of the level of harm.

54. In the Respondent's bundle, the Respondent has included part of its Civil Penalty Policy and at the hearing there was a discussion as to the meaning of the section headed "Final determinate of the level of any civil penalty" and the requirement that the "final determinate of any civil penalty MUST be the general principle: The civil penalty should be fair and proportionate but in all instances should act as a deterrent and remove any gain as a result of the offence". It seems to us that this section gives a general discretion on the Authority and on the Tribunal when it comes to applying the policy as to the amount so as to ensure that the outcome is "fair and proportionate" but in any event it was suggested at the hearing that this was not the type of appeal where it would be appropriate to depart from the matrix. In this instance we agree, but only because it is possible to use the matrix in this appeal so as to give a fair and proportionate outcome. In the event that a fair and proportionate outcome were not permissible under the matrix

then we would have departed from the matrix so as to achieve a fair outcome.

Culpability and Harm

55. Taking account of the Respondent's Civil Penalty Policy, and assessing the issues anew, we think this offence gives rise to a medium level of culpability for the following reasons.

56. We do not think that this appeal falls into the low-level banding as the Appellant cannot be said to have committed an offence with little fault. These are not technical breaches nor an isolated occurrence. Nor do we agree with the Respondent that culpability should be high. Whilst we accept that Mr Whalley is a professional landlord, we do not think that he has either "intentionally or recklessly" breached or wilfully disregarded the law. For the reasons set out above, at the highest his actions have been negligent. We accept that he generally relies on tenants to report disrepair and damage at their property but that certain items should have been picked up during pre-tenancy let (such as the cellar ceiling) or during routine inspection. The fact that these were not picked up and dealt with has resulted in a negligent breach of the licence conditions rather than wilful or reckless.

57. In relation to harm, we do not accept that this is a situation with a low level of harm. In relation to the breaches which we have found proven, the potential risk of harm from a fire in the basement spreading through the lack of a proper functioning ceiling, for example, would not constitute a low risk of harm. Likewise, we do not agree with the Respondent that the level of harm is high. Many of the breaches are relatively minor and are unlikely to give rise to a "serious effect on an individual or widespread impact". Whilst we have highlighted a risk of fire spreading, and we can add to this, falls on stairs, the level of harm seems to us to fit more happily within the medium bracket. We think that the breaches could have an "adverse effect on an individual" but that this adverse effect is neither low nor high.

58. It follows that as the level of culpability is medium and the level of harm is medium, the appropriate starting point is £10,000.

Aggravating/Mitigating Factors

59. We do not agree with the Respondent that there are any aggravating factors in relation to this offence. Whilst we accept that there are a number of items of non-compliance, we think that most of these are minor in nature. We think that there is one significant breach – lack of proper ceiling in the cellar – but otherwise the number of items should not give rise, in our view, to an uplift. We do not think that Mr Whalley was motivated by financial gain. There is no evidence to substantiate this, and we note that throughout he has undertaken works ultimately to remedy the breaches. We think if

anything he was simply tardy and disorganised. We do not think that the offence has been committed over a long period of time in the circumstances of this appeal. We accept that the case was started in May 2022 and works were completed in early January 2023, but we also note that it was not until 19 August 2022 that the Respondent visited at which point, different and more extensive items were identified than the list in the letter sent on the 13 May 2022. It would be unfair to say that the whole of the breach stretched to the whole of this period in those circumstances.

60. Finally, we do not accept that the fact that the Appellant is a member of an accredited scheme is an aggravating factor. This aspect of the policy struck us as being irrational given that willingness to join an accredited scheme (i.e. by a landlord who is not a member of a scheme) would be a mitigating factor. If anything, the fact that Mr Whalley was a member of an accredited scheme should be neutral.

61. In relation to mitigating factors, we agree with the Respondent that the Appellant's cooperation throughout should be recognised; that his timely acceptance of responsibility and his lack of previous convictions ought to be included as mitigating factors. Added to this, we have found that at times the tenant has obstructed entry preventing access for works and we also add that otherwise Mr Whalley has had a bout of ill health which prevented him from undertaking works of repair: he had covid during the relevant period.

Conclusion

62. In those circumstances from the Respondent's matrix set out in its Civil Penalty Policy as reproduced in the bundle, a medium degree of culpability and a medium degree of harm starts at £10,000. From this we take a 5% deduction for the mitigating factors set out above, £2500, to give a financial penalty of £7500.00 for the offence under section 95(2) of the Housing Act 2004.

63. That is the decision of the Tribunal.

Signed Phillip Barber Dated 06 October 2023

Phillip Barber, Judge of the First-tier Tribunal